UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

UNITED NURSES & ALLIED PROFESSIONALS
(KENT HOSPITAL),

Respondent,

Case No. 1-CB-11135

and

Jeanette Geary, an Individual,

Charging Party.

CHARGING PARTY'S OPPOSITION TO RESPONDENT UNITED NURSES & ALLIED PROFESSIONAL UNION'S EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE AND SUPPORTING BRIEF

Matthew C. Muggeridge, Esq.
Attorney for Charging Party Jeanette Geary
c/o National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Rd., Ste. 600
Springfield, VA 22160
(703) 321-8510

Pursuant to Sec. 102.46(d)(1) of the NRLB's Rules and Regulation, Charging Party submits this brief in opposition to Respondent United Nurses & Allied Professional Union's (the "UNAP" ; the "union") Exceptions To The Decision of Administrative Law Judge and the accompanying brief.

I. INTRODUCTION

The Respondent has excepted to the Administrative Law Judge's decision in three instances:

1) That the union violated Section 8(b)(1)(A) of the Act by charging nonmember "*Beck*" Objectors for lobbying activities involving a bill before the Rhode Island and Vermont state legislatures entitled: a "Bill Relating to Public Officers and Employees-Retirement System Contributions and Benefits." Resp. Exceptions at 2; ALJD at 7:6-11; Jt. Ex. 7.

2) That the union violated Section 8(b)(1)(A) of the Act by charging nonmember "*Beck*" Objectors for lobbying activities involving a bill before the Rhode Island and Vermont state legislatures entitled: a "Bill Relating to Health and Safety-Center for Health Professionals Act." Resp. Exceptions at 2; ALJD at 7:13; Jt. Ex. 11.

3) That the union violated Section 8(b)(1)(A) of the Act by charging nonmember "*Beck*" Objectors for lobbying activities involving bills before the Rhode Island and Vermont state legislatures "that would have required certain hospitals to purchase equipment to assist employees in lifting and moving patients, and to prohibit certain mandatory overtime work for certain health care employees." Resp. Exceptions at 2-3; ALJD 7:19-21; Jt. Ex. 7.

II. ARGUMENT

A. The Respondent's Arguments Concerning "Pooling" Are Irrelevant.

Much of Respondent's brief in support of its exceptions argues the legality of

charging nonmember *Beck* objectors for "otherwise chargeable activities undertaken on behalf of bargaining unit employees in bargaining units other than their own." Resp. Exceptions at 5, ¶ 1 thru 14, ¶2. The Respondent's arguments concerning pooling are irrelevant.

Even assuming that the Respondent has correctly stated the law — *i.e.* that a nonmember objector in one unit may be charged for union expenditures potentially benefitting represented employees in another unit — that legal question is not being raised in this case. When Respondent billed Charging Party Geary for its lobbying expenses it was unlawful not because the lobbying theoretically benefitted employees in units other than the Charging Party's own. There is no such allegation in the Amended Complaint. The argument was not raised at any point during the hearing, either by the Charging Party or the Acting General Counsel. Evidently, the ALJ did not base any part of his decision on that legal theory. Making the lobbying chargeable to nonmember objectors here was unlawful because the lobbying in question was not chargeable, in itself.

The issue in this case is: May the union charge a nonmember objector for specific lobbying expenses? This question is to be analyzed independently from any consideration of the Charging Party's bargaining unit or which employees will be the intended beneficiaries of the lobbying result. While Charging Party disagrees with the law which allows unions to charge nonmember objectors expenditures purportedly benefitting

represented employees in other units, Charging Party contends that the issue is not raised by this case.

Respondent cites *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 508 (1991), in support of its irrelevant arguments concerning the chargeability to nonmember objectors in one unit for expenses benefitting represented employees in another: "[a] local bargaining representative may charge objecting nonmembers for their pro rata share of the costs associated with **otherwise chargeable** activities of its state and local affiliates...." Resp. Exceptions Brief at 5 (emphasis added here). The key language is "otherwise chargeable." If an expense is incurred by a union for the intended benefit of a represented employee in one unit, under *Lehnert* it may be charged to a nonmember objector in another unit only if it is an expense which is legally chargeable. Therefore, the only issue here is the legal chargeabililty of the particular union expense to the nonmember objector.

Respondent argues both sides of this irrelevant issue. On the one hand, Respondent argues that *Lehnert* stands for the proposition that Charging Party may be charged for lobbying costs incurred on proposed legislation which will not benefit her. On the other hand, Respondent, referring to many other benefits obtained by Charging Party's local, *e.g.* organizing and representation, apparently argues the appropriateness of the pooling arrangement which "clearly *redounded* to Local 5008's benefit in grand fashion in FY 2009." Resp. Exceptions Brief at 13 (emphasis in original). In other words, a nonmember

objector such as the Charging Party may be charged for all union expenses, even if she does not derive any benefit from them, and should also be charged for expenses which she is getting a good deal on, having not "paid for", although benefitting. Apart from exposing the inequity to *Beck* objectors of the legal regime governing chargeability, Respondent's arguments are irrelevant to this case.

B. The Respondent's Lobbying Fails The Test for Chargeablity Under Ellis

Charging Party contends here that all lobbying is nonchargeable, except that which implements or ratifies a collective bargaining agreement following *Lehnert*. If the Board rejects the *Lehnert* standard, however, Charging Party Geary contends that the lobbying in question is also nonchargeable under the Board's own *Johnson Controls*, 329 NLRB 543 (1999), standard which, adopted the holding in *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1994); Resp. Brief at 15.

> The test must be whether the challenged expenditures are **necessarily or reasonably incurred** for the purpose of **performing the duties of an exclusive representative** of the employees in **dealing with the employer** on **labor-management issues**. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. (Emphasis added)

466 U.S. at 448.

1. The UNAP Ignores The Elements of the *Ellis* Test For Chargeability

The UNAP ignores the phrase "necessarily or reasonably incurred" from *Ellis*. Instead, the UNAP emphasizes a different formulation of what must be the same legal standard, since it is taken from the very same paragraph of the *Ellis* decision. The word "necessarily" in the first formulation at the start of the paragraph, clearly subsumes the concept of "normally" later on in the paragraph where the court stated that union activities are chargeable when they are "normally and reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Id.* at 448.

There are two problems with substituting the second, subordinate "normally and reasonably" standard for the logically primary "necessarily or reasonably incurred" one. First, the word "normally" as used here, is indiscriminate in all respects save unexceptionality and frequency. "Normally" implies no other description, evaluation, significance or categorization. An activity which is "normally" undertaken means only that the activity is frequent and unremarkable. As such, "normally" can provide no meaningful legal standard to characterize an action, and certainly cannot be employed here to justify the chargeability of lobbying expenses. There are many expenses which unions "normally" incur, but not all of them will therefore be chargeable. A union may "normally" engage in lobbying, but that does not make the lobbying chargeable.

2. Only Activity Related To the Union's Duty of Fair Representation May Be Charged To Nonmember Objectors

Second, the UNAP overlooks the demand in *Ellis* that in order to be chargeable a union activity must be "necessarily or reasonably" related to the union's duties as the exclusive representative. In other words, if the union did not perform a certain activity, it would be guilty of a breach of its "duty of fair representation" as that duty has been developed by the courts, starting with *Steele v. Louisville Nashville* R.R., 323 U.S. 192 (1944). The *Ellis* test is tied to the union's duty as exclusive representative. If that duty is not the duty of fair representation, but rather some indeterminable range of conduct which the union could engage in or not, presumably following its decision-makers' preferences, that "duty" would imply no restriction on union conduct. In this case, Charging Party could not successfully sue the Respondent for a breach in its duty of fair representation for its failure to engage in lobbying of the type found nonchargeable here, or for that matter, any lobbying. The lobbying is therefore not born of the duty of fair representation and therefore is not chargeable.

National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165, (C.A.D.C. 1986), analyzed the relationship between the powers of a union as the exclusive representative and its implied duties, according to the doctrine of the duty of fair representation. In that case, an employee sued the union for an alleged breach of its duty of fair representation. The union had failed to provide him with an attorney to defend against a discharge action brought by his public employer. The statute under

which the employee was fired related to a matter not governed by the collective bargaining agreement. Citing *Steele*, 323 U.S. 192 (1944), as the case which created the doctrine of the duty of fair representation, the court in *National Treasury Employees* found that

> So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.
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> [T]he case creating the duty of fair representation, [*Steele v. Louisville Nashville R.R.*] repeatedly rooted that duty in the powers conferred upon the union by statute, the powers belonging to the union as exclusive representative. The duty was thus co-extensive with the power; the duty is certainly not narrower than the power, and this formulation indicates that it is also not broader. (footnotes and citations omitted).

800 F.2d at 1169.

The holding in *National Treasury Employees* applies to the present case in this way: 1) *Ellis* allows unions to charge *Beck* objectors for expenses related to the union's fulfillment of its duty as the objector's exclusive representative, *i.e.*, its duty of fair representation towards members and nonmembers of the union; 2) The duty of fair representation is co-extensive with the union's power as an exclusive representative; 3) The union's duty of fair representation is limited to conduct stemming from its role as exclusive representative, *i.e.*, as collective bargaining agent; 4) Following *National Treasury Employees,* the union *may* discriminate against nonmembers in matters not

included in the collective bargaining agreement; 5) Conduct *not* included in its collective bargaining role *may not* be assumed as part of its duty of fair representation; 6) The cost of union conduct which is not part of the duty of fair representation is not chargeable to nonmember objectors; and 7) Lobbying is not part of the union's duty of fair representation and is therefore non-chargeable to *Beck* objectors.

3. Only Expenses Involving Dealings With The Employer On Labor Management Issues May Be Charged To Nonmember Objectors.

Finally, the UNAP's lobbying charges fail the *Ellis* requirement that the expenses to be charged must be incurred in the course of the union's "dealing[s] with the employer on labor-management issues." Self-evidently, when it lobbied state legislatures in Rhode island and Vermont, the Respondent was not "dealing with the employer on labor-management issues." It was not dealing with Charging Party's Employer, Kent Hospital, or any employer with whom it has a current bargaining relationship. It was not dealing with labor-management issues, if those are understood to mean provisions in a collective bargaining agreement. This failure of the *Ellis* test applies to all the union's lobbying at issue in this case, both that held to be chargeable and nonchargeable by the Administrative Law Judge.

C. The UNAP Mischaracterized The Purposes Of Its Lobbying.

In arguing that its lobbying efforts were properly chargeable to nonmembers, the Union described only some elements of the proposed legislative outcomes. The union

limited its exposition of the bills it lobbied for and made chargeable to nonmember objectors. At the hearing and in its briefs, the union only partially described the proposed outcomes focusing on those which would theoretically inure to the benefit of at least some represented employees. The union made no mention of the potential legislative outcomes which would primarily benefit the union. The Respondent made no argument, and there is no legal authority to support the notion that lobbying which benefits a union or improves its leverage within the relevant system is properly chargeable to nonmembers.

1. The Safe Patient Handling Bill Was At Least Partially Intended To Increase Union Control In Hospitals

Regarding the union's lobbying in Vermont on "The Safe Patient Handling Bill," Jt. Ex. 13, the bill's legislative findings and intent are set out in Jt. Ex. 13 at 2-3. The union's brief further highlighted the many ways which the bill would improve working conditions for health care workers generally, reducing injuries and lengthening nursing careers. Resp. Exceptions Brief at 16-17. The bill called for "hospitals to establish a safe patient handling program." Resp. Exceptions Brief at 16. Because workplace safety is "germane to collective bargaining," the union argued that the lobbying on workplace safety was chargeable under *Johnson Controls*.

The union made no reference at trial or in its briefs to proposed Section 2505(a), found on the last page of the Safe Patient Handling Bill. Jt. Ex. 13 at 7. That section

would mandate: "In a facility where health care workers are represented by a collective bargaining agent, the collective bargaining agent shall select the health care worker committee members." By the proposed legislation the union would have gained control of "all aspects of the development, implementation, and periodic evaluation and revision of the facility's safe patient handling program, including the evaluation and selection of patient handling equipment and aids and other appropriate engineering controls." *Id.*

The legislation does not indicate why the safe patient handling committee should be under the control of the union where the union is present. Clearly, at least some of the motivation behind the bill was to increase the union's control of the workplaces where it is present, completely outside the bounds of any collective bargaining activity or duty of fair representation. The union should not be able to charge nonmember objectors for lobbying whose intent is to increase union control of workplace conditions in hospitals, outside the parameters of the collective bargaining relationship.

2. The Mandatory Overtime Bill

The UNAP charged nonmembers for its lobbying on The Mandatory Overtime Bill in Vermont. Jt. Ex. 14. The bill would have prevented health care facilities from being licensed unless these facilities complied with various limitations on overtime work assignments. The union purportedly sought to protect its own represented employees in Vermont from onerous overtime requirements. Resp. Exceptions Brief at 18-19.

The restrictions proposed in the Mandatory Overtime Bill are much greater than

those negotiated in the UNAP's collective bargaining agreement with Health Care & Rehabilitation Services of Southeastern Vermont. Jt. Ex. 15. In that collective bargaining agreement, the sole restriction on overtime is that it "must be pre-approved by the employee's supervisor," and that the "time be paid at one and one half times" the rate of pay. Jt. Ex. 15 at 14-15.

In lobbying on the overtime bill, the union sought to oblige its collective bargaining partner and all health care employers in Vermont, completely separate from the collective bargaining process, to far greater overtime restrictions. The UNAP's argument is that because overtime is a matter "germane to collective bargaining" lobbying the state on overtime is chargeable. The union misrepresented its own bargained agreement in Vermont on overtime. In negotiating that agreement, the union acted within the bounds of its exclusive representative role. In its lobbying the union acted outside its exclusive representative collective bargaining role.

3. Nonmember Objectors Should Not Have To Pay For Lobbying On Bills That Would Increase The Costs Of The State Pension Plan.

Another bill the union lobbied on which was ruled nonchargeable by the Administrative Law Judge concerned the pensions of nurses who had retired from state employment. The bill would have doubled the amount of post-state employment money which a retired nurse could make without penalty to her state pension. UNAP lobbied on this bill on behalf of "state-employed nurses who are in the State of Rhode Island

bargaining unit, UNAP Local 5019." Resp. Exceptions Brief at 21.

The Rhode Island pension scheme for public nurses is not a matter of collective bargaining between the UNAP and any employer. It is a statutory scheme, approved through a legislative process. One can speculate on the policy reasons for limiting pension payouts depending on the current income of a pension recipient: *e.g.*, reducing state expense, promoting employment, preventing "double-dipping". Such policy decisions are proper to a legislature and individuals are free to support or oppose them. The union's representation of its employees takes place in the collective bargaining relationship, not by shaping state legislation, even if that legislation affects some represented employees. While voluntary union members may wish to support the UNAP's wide-ranging legislative agenda, affecting state expenditures, hospital mergers, state pension schemes, *etc*., the union's lobbying efforts here should not be chargeable to nonmember objectors. These employees may have become nonmember objectors precisely because they do not endorse the union's political agenda.

4. The Nursing Shortage Bill

As its name implies, and as argued in the UNAP's brief, the Nursing Shortage Bill was ostensibly designed to address the nursing shortage in Rhode Island." Jt. Ex. 11; Resp. Exceptions Brief at 23.

Concretely, the proposed law would "hereby create[] a center for health professions under the auspices of the Health Partnership Council of Rhode Island for the

purpose of developing a sufficient, diverse, and well-trained healthcare workforce to ensure the citizens of Rhode Island continue to have access to high quality healthcare." Jt. Ex. 11 at 2.

Many aspects of the legislation are unclear and not explained by the UNAP. First, how does increasing the number of nurses help currently represented nurses when more nurses will presumably decrease the demand for nurses and correspondingly affect wages and employment opportunities? The union does argue that the nursing shortage results in nurses "being asked to handle more patients than they can safely care for" and "require[s] nurses to float from one unit to another." Resp. Exceptions Brief at 23. Secondly, who will run and fund the proposed "center"? Third, what is the "Health Partnership Council of Rhode Island," referenced in the bill? Nothing in the record explains the union's relationship to the Health Partnership Council of Rhode Island. To the extent that the UNAP is part of Health Partnership Council, its lobbying here would be to further its own ends, and not to fulfill its function as an exclusive bargaining representative.

Fourth, and most importantly, how does "ensur[ing] the citizens of Rhode Island continue to have access to high quality healthcare" fit within the scope of the union's duties as exclusive bargaining representative of nurses? Such a duty corresponds to a political or public interest organization, but is not proper to a labor organization in its role as collective bargaining agent. Therefore lobbying for such a purpose would be nonchargeable to *Beck* objectors.

D. The UNAP's Lobbying Should Be Ruled Illegal Regardless Of The Amount Charged.

The Respondent argues that because the monetary amount in question is small, the lobbying should not be ruled illegal on *de minimis* grounds. Resp. Exceptions Brief at 25-27. The UNAP cites cases and other authority where, in the interests of judicial economy, the Board has declined to prosecute what might be a valid a charge. *See, e.g.*, *Memorandum GC 95-15*; *American Federation of Musicians, Local 76*, 202 NLRB 620 (1973).

Charging Party contends that the legal principle at stake far outweighs the size of any financial reimbursement she stands to reap should the union's lobbying expenses be ruled nonchargeable.

In the first place, as argued elsewhere in this record, this case involves not only the discrete question regarding this or that lobbying cost deemed chargeable to *Beck* objectors by the union. *See, e.g.*, Charging Party's Post-Hearing Brief at 2. It also deals with the process by which *Beck* objectors may be provided reliable financial information on which to base their objection. On those issues, the Charging Party has not been permitted to testify regarding the unreliability of the union's accounting of its *Beck* expenses. Nor has the union been obliged to respond to subpoenas regarding its actual lobbying expenses. *See* Charging Party's Post-Hearing Brief at 11-24. The Board should not accept any "*de minimis*" claims when the union's accounting is open to question and where Charging

Party has not been permitted to develop a full record.

Secondly, if the union is allowed to charge nonmembers for its lobbying is what the UNAP refers to as "minor or technical in nature and of no real moment" then nothing prevents this union or others from expanding their lobbying efforts and illegally charging nonmembers for the costs. Resp. Exceptions Brief at 27.

Thirdly, the UNAP may not avail itself of the dubious privilege of inaccurate reporting to justify the chargeablity of its lobbying expenses and the unreliability of its accounting processes here, a privilege the UNAP argues was granted in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, fn 18 (1986): "We continue to recognize that there are practical reasons why absolute precision in the calculation of the charge to nonmembers cannot be expected or required." (Citation and internal quotations omitted).

III. CONCLUSION

Based on the foregoing, Charging Party respectfully contends that the ALJ did not err in his ruling that some of the union's claimed lobbying expenses were not legally chargeable to nonmembers.

Dated this 11th day of May, 2011.

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Respectfully submitted,

/s/

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Matthew C. Muggeridge
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
Attorney for Charging Party Jeanette Geary

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Exceptions and Brief was electronically filed via the NLRB website. A copy of the foregoing was also electronically filed with Region 1, and was sent via e-mail to Don Firenze, Counsel for the Acting General Counsel (Don.Firenze@nlrb.gov) and to Chris Callaci, Counsel for the UNAP, (ccallaci@unap.org) and mailed by US mail, first-class, postage prepaid, to Jeanette Geary, P.O. Box 216, 479 Spring St, #1, Newport, RI 02840.

/s/ Matthew C. Muggeridge

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Matthew C. Muggeridge